PASUPATHY KANAGASABY

v.

DATO' ABD RASHID MOHD SHARIFF & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LOUIS O'HARA J
[SUIT NO: 23NCVC-51-04-2012]
10 AUGUST 2012

TORT: *Defamation - Absolute privilege - First information report - Whether complainant can be sued for defamation if statement in police report is detrimental and damaging to another - Whether defence of absolute privilege available to first information report though it may be defamatory in nature*

The plaintiff was a consultant while the first defendant was the employee/agent of the second defendant. The plaintiff's claim was premised on the fact that the first defendant had lodged a police report and in their natural and ordinary meaning, the words in the said report meant that the plaintiff had deliberately given false evidence in another civil suit which was detrimental and damaging to the second defendant. Due to the said publication, it was the plaintiff's allegation that his character had been injured and therefore, suffered damages. In their defence, the defendants claimed justification and that the statements contained in the police report were protected by absolute privilege under common law. In light of this, the defendants filed an application to strike out the plaintiff's claim under O. 18 r. 19(1)(a) of the Rules of the High Court 1980. Thus, the primary issue for consideration herein was whether the police report made was afforded the protection of absolute privilege.

Held (allowing defendants' application with costs):

(1) It is only in plain and obvious cases that recourse should be had to the remedy of striking out, *ie*, when the claim is obviously unsustainable. The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or an abuse of process (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd*; refd). (para 9)

(2) The Defamation Act 1957 ('the Act') does not address in totality the defence of absolute privilege whereas s. 11(1) of the Act only relates to its applicability in the limited context of the report of court proceedings. Further, English common law principle of affording absolute privilege to first information reports has not been incorporated into the Act and as such, our courts can apply English and other common law principles until and unless it is statutorily provided for under the Act. Since it is not, Malaysian courts can develop the common law with regards to protection of first information reports by absolute privilege through application of the current, relevant and applicable English common law, and the common law of other countries (*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*; dist, *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*; foll). (paras 16, 18, 20 & 36)

(3) The defence of absolute privilege is available with regard to a first information report and is so protected even though it may be defamatory in nature. It is primarily a public interest, public policy common law defence which has evolved over the years to extend absolute privilege to first information reports. (paras 37 & 38)

(4) Public policy and interest demands that a person be free to lodge a first information report without the threat of being sued for defamation. While he is protected as such, he is not immune to a charge for lodging a false police report to a civil suit for malicious prosecution. Hence, with the first information report being absolutely privileged, the plaintiff's claim was rendered obviously unsustainable and devoid of a cause of action. (paras 38 & 40)

Case(s) referred to:

Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim [2009] 2 CLJ 121 CA ***(refd)***

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Bandar Builders Banking and Finance & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

BHLB Trustee Bhd & Anor v. HSBC (Malaysia) Trustee Bhd & Ors [2006] 5 CLJ 381 HC ***(refd)***

Bira Gareri v. Dulhin Somaria AIR [1962] Patna 229 ***(refd)***

BP PLC v. Mohd Shariff Abdullah [2009] 7 CLJ 381 HC ***(refd)***

Buckley v. Dalziel & Anor [2007] 1 WLR 2933 ***(refd)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(dist)***
Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***
Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***
Kinyo Coating (M) Sdn Bhd v. ICI Paints (Malaysia) Sdn Bhd & Anor [2011] 6 CLJ 911 HC ***(refd)***
Madhab Chandra v. Nirod Chandra AIR [1939] Calcutta 477 ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(foll)***
Messrs Bapalal & Co v. AR Krishnaswami Iyer AIR [1941] Madras 26 ***(refd)***
Mijju v. Lachman Prasad AIR [1924] All 535 ***(refd)***
Taylor v. Director of the Serious Fraud Office [1999] 2 AC 177 ***(refd)***
Thiruchelvasegaram Manikavasegar v. Mahadevi Nadchatiram [2000] 5 CLJ 435 HC ***(refd)***
V Naryana Bhat v. E Subbana Bhat AIR [1975] Karnataka 162 ***(refd)***
Wescott v. Wescott [2009] 2 WLR 838 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Contracts Act 1950, s. 24
Defamation Act 1957, ss. 8, 9, 11(1), 13, 14
Rules of the High Court 1980, O. 18 r. 19(1)(a)

For the plaintiff - Nora Hayati Ismayatim; M/s Nora Hayati & Assocs
For the defendant - Suren Anandan Raja Ganesh Anandan; M/s BH Lawrence & Co

Reported by Kumitha Abd Majid

JUDGMENT

John Louis O'Hara J:

Introduction

[1] This matter came before me as the hearing of the defendant's application encl. 19 to strike out the plaintiff's writ of summons and statement of claim under O. 18 r. 19(1)(a), Rules of the High Court.

[2] I allowed the defendant's encl. 9 and the plaintiff now appeals against my decision.

[3] In handing down my decision on 12 June 2012 I had stated that proper grounds would follow if required. These then are my proper grounds.

The Factual Matrix

[4] The plaintiff is a consultant while the 1st defendant was the employee/agent of the 2nd defendant.

[5] On 16 May 2011 the 1st defendant made a police report *vide* Sentul Report/006055/11 (the police report) in which the 1st defendant stated as follows:

> Pada 23 April 2010 seorang individu bernama Pasupathy a/I Kanagasaby K/P 450714-05-5029 telah membuat dan memberikan kenyataan dan keterangan yang palsu di bawah Sumpah semasa memberikan keterangan dalam kes saman sivil pada 23 April 2010 di Mahkamah Tinggi Kuala Lumpur kes No. S6-22-589-2008 mengatakan bahawa beliau telah membeli enam unit kedai dari Kemacahaya Development Sdn Bhd dan Syarikat Kemacahaya Sdn Bhd (kedua-duanya dikenali sebagai Kemacahaya) sebagai balasan hutang lampau.
>
> Kenyataan Pasupathy a/l Kanagasaby (Pasupathy) dalam affidavit yang di ikrarkan pada 13 Februari 2007 di Petaling Jaya adalah berbeza dan bercanggah dengan keterangan yang diberikan di Mahkamah Tinggi Kuala Lumpur pada 23 April 2010 dalam kes S6-22-589-2008 kerana dalam kenyataan beliau mengatakan bahawa bayaran enam unit rumah kedai yang dibeli dari Kemacahaya adalah sebagaimana yang dicatit dalam perjanjian jual beli iaitu melalui dua keping cek.
>
> Pencanggahan ini dapat dilihat di dalam:
>
> (i) Writ Saman Pasupathy dalam tindakan kes Mahkamah Tinggi Kuala Lumpur Kes No: S6-22-589-2008;
>
> (ii) Pembelaan Kemacahaya dalam tindakan Mahkamah Tinggi Kuala Lumpur Kes No: S6-22-589-2008;
>
> (iii) Penyataan saksi Pasupathy dalam sumpah yang digunakan dalam tindakan kes Mahkamah Tinggi kes No: S6-22-589-2008;
>
> (iv) Pembelaan Pasupathy dalam tindakan kes Mahkamah Tinggi No. S6-22-96-2007;

(v) Mukasurat tiga Nota Keterangan dan mukasurat lapan alasan penghakiman kes Mahkamah Tinggi Kuala Lumpur Kes No. S6-22-589-2008.

Dengan menggunakan penyataan dan keterangan palsu dan "fraud" Kemacahaya telah mendapat perintah dari mahkamah bertujuan memudarat dan menyebabkan kerugian kepada Masterskill (M) Sdn Bhd melalui peguam yang mewakili kedua-dua Pasupathy dan Kemacahaya iaitu En. T. Gunaseelan dan En. Rajakumar daripada Tetuan Law, Raj & Teh yang telah membantu melakukan "fraud" tersebut. Tindakan mereka memalsukan fakta dan mendapatkan perintah mahkamah secara "fraud" untuk memudaratkan Masterskill (M) Sdn Bhd adalah salah dan perlu disiasat dibawah s. 192/193 Kanun Keseksaan. Saya memohon satu siasatan dapat dijalankan ke atas laporan ini.

[6] The plaintiff claims that in their natural and ordinary meaning the words meant and were understood to mean that the plaintiff deliberately gave false evidence in Kuala Lumpur High Court Civil Suit No. S6-22-589-2008 and by virtue of the false evidence, a company known as Kemacahaya Development Sdn Bhd and Syarikat Kemacahaya Sdn Bhd had fraudulently obtained a court order which is detrimental and damaging to the 2nd defendant; and that by reason of the publication of the words the plaintiff has been injured in his character, credit, reputation and hurt in his feeling and has suffered damages.

[7] The defendant claims justification and relies upon s. 8 of the Defamation Act 1957 (the Act).

[8] The defendant also claims that the statements contained in the police report are protected by absolute privilege, under common law.

The Law In Regard To Striking Out

[9] The law in regard to a striking out application of this nature is trite. It is only in plain and obvious cases that recourse should be had to the remedy of striking out, ie, when the claim is obviously unsustainable. The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or an abuse of process. See *Bandar Builders Banking and Finance & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. The test to my mind is a *prima facie* test and not a test of the merits. The merits are best left to the trial judge.

[10] In *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285, Low Hop Bing JCA stated that:

> There is plethora of weighty authorities setting out trite principles governing an application under O. 18 r. 19(1). It has been consistently stated by our courts that any pleading may be struck out if it is obviously unsustainable. Such discretionary power may only be exercised in plain and obvious cases: see eg, *Tractors Malaysia v. Tio Chee Hing* [1975] 1 LNS 133; [1975] 2 MLJ 1; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; Pengiran Othman Shah Pengiran *Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257; *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293; and *Hj Hussin Hj All & Ors v. Datuk Hj Mohamed Yaacob & Ors & Other Cases* [1983] 2 CLJ 214; [1983] CLJ (Rep) 579.

[11] In *BP PLC v. Mohd Shariff Abdullah* [2009] 7 CLJ 381 @ pp. 386 & 387, Ramli Ali J as he then was stated as follows:

> The relevant principles of law to be applied in an application under on O. 18 r. 19(1)(a) of RHC 1980, may thus be summarized as follows:
>
> (a) The court must only consider whether on the face of the impugned pleading (ie, the plaintiffs statement of claim), a reasonable cause of action is disclosed.
>
> (b) In respect of what is a "reasonable cause of action", so long as the statement of claim discloses some cause of action or raises some question fit to be decided by a judge, the mere fact that the case is weak or not likely to succeed is not a ground for striking it out;
>
> (c) In considering the said impugned pleading, the court is to assume that all the facts pleaded in the statement of claim are true. As a consequence, the defendant cannot base its grounds for striking out on the allegation that the facts in the statement of claim are untrue;
>
> (d) The defendant cannot refer to external circumstances or allegations to contest the plaintiff's pleaded cause of action; and
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> (e) A pleading should only be struck out if on the face of it, it is hopeless or plainly unsustainable.

Consideration And Decision

[12] This court has therefore to consider and decide if the plaintiff's statement of claim discloses a reasonable cause of action. If it does not then the plaintiff's claim is obviously unsustainable and it becomes a plain and obvious case for striking out under O. 18 r. 19(1)(a).

[13] The primary question that this court has to consider is whether the police report made by 1st defendant is afforded the protection of absolute privilege. If the answer is in the affirmative then this would necessarily mean that the plaintiff's statement of claim is devoid of a cause of action and ought to be struck out.

[14] The doctrine of absolute privilege has its origins in the English Common Law but has since been supplemented to a limited extent by statutory provisions.

[15] By virtue of s. 3 of the Civil Law Act 1956, the common law of England is applicable except in so far as it has been modified by the provisions of the Malaysian Defamation Act 1957. There are provisions in the Malaysian Defamation Act which are in *pari material* with the English Defamation Act 1952. The law here is, therefore for all practical purposes the same as the law of England. (see *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 31 MLJ 142 @ 150 per Hepnorth J.

[16] But it is my considered opinion that the Defamation Act 1957 does not address in totality the defence of absolute privilege. s. 11(1) only relates to its applicability in the limited context of the report of court proceedings.

[17] The plaintiff further argues that in view of s. 3 of the Civil Law Act 1956, this court can apply the common law of England but as administered in England on 7 April 1956 and save where no provision has been made by Malaysian Statute Law.

[18] In applying the common law in regard to the defence of absolute privilege I was aware of the *dicta* of Abdul Hamid Mohamad FCJ (as he then was) in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 @ p. 30 where the learned judge said at paras. 30-31:

> [30] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have

A to look anywhere else, If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether 'local circumstances' and 'local inhabitants' permit its application, as such. If it is 'permissible' the court should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is 'permissible', with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia's own common law. *In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other countries.*

[31] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rational of Malaysian courts applying 'archaic' common law of England which reason, in law, is difficult to justify. *As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision*. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their judgments the effects of that provision. For example, in *Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors* [1990] 3 MLJ 468, Peh Swee Chin J (as he then was) referring to the proviso to s. 3(i) said:

> We have to develop our own common law just like what Australia has been doing, by directing our mind to the 'local circumstances' or 'local inhabitants'.

[19] I therefore apply the common law of England and other countries, following the *dicta* of Abdul Hamid FCJ in the *Majlis Perbandaran Ampang Jaya* case by adopting the recent developments in the common law of England, and these other countries.

[20] *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57, can be distinguished because in that case the relevant principle of common law had been incorporated into statutory law as contained in s. 24 of the Contracts Act 1950. However in our case the English common law principle of affording absolute privilege to first information reports has not been incorporated into our Defamation Act 1957

and as such Malaysian Courts can apply that English and other common law principles until and unless it is statutorily provided for in our Defamation Act 1957. And since it is and has not, Malaysian Courts can develop the common law in regard to the protection of first information reports by absolute privilege by applying the current, relevant and applicable English common law, and the common law of other countries.

[21] In developing the Malaysian common law in regard to the doctrine of absolute privilege, Malaysian Courts are at liberty to also consider and when appropriate follow and adopt the evolving common law principles in like-minded and similar jurisdictions such as India, which follow English principles. See *Bira Gareri v. Dulhin Somaria* AIR [1962] Patna 229 wherein it was held that:

(a) In India the criminal liability for defamation is codified and embodied in s. 499 of the Penal Code and differs from the law in England in that regard. The civil liability for defamation to pay damages, however, is not governed by any statute law but is determined with reference to the principles of justice, equity and good conscience, which generally have been imported in this country from the English principles. There seems to be a little scope for an appreciable difference between the Indian and the English law on this subject.

(b) In India giving information to the police of a cognizable offence with the object of setting the law in motion for the police to investigate and institute the case to be tried in a court of law is a necessary step to be taken in the conduct of a legal proceeding and statements made in such an information must be absolutely privileged. The mere fact that a final report was submitted in the case, would not make any difference. Judicial proceedings might start of might not. The question as to whether the statement made in an information given to the police of a cognizable offence is absolutely privileged or not would not depend upon the future event of the starting of the judicial proceedings. Even after starting of such proceedings, it may be found that the case was false and that the information was given out of malice. It may well be that if the information is found to be false and to have been actuated by malice, the informant is criminally liable for defamation under the Indian law as embodied in s. 499 of the Panel Code or even civilly liable under certain circumstances to pay damages for malicious prosecution but he must be held to enjoy the absolute privilege and protected from civil liability for defamation on such a statement.

and that giving of information to the police of a cognizable offence with the object, of setting the law in motion for the police to investigate and institute the case to be tried in a court of law is a necessary step to be taken in the conduct of a legal proceeding and statements made in such an information must be absolutely privileged.

[22] In *V Naryana Bhat v. E Subbana Bhat* AIR [1975] Karnataka 162, M Sadanandasuamy J in his judgment at p. 163 referred to *Mijju v. Lachman Prasad* AIR [1924] All 535 where the full bench held that in the case of a report made to a police officer, the question whether it is covered by absolute privilege is governed by the English common law and since the statements made in the course of a judicial proceeding are absolutely privileged in England, they must be held to be absolutely privileged in India following an earlier decision of the full bench of the same court.

[23] The learned judge went on to explain as follows:

> 7. The reason why absolute privilege is extended to the statement of a witness made prior to the commencement of a judicial proceeding is based on public policy as stated by Lord Halsbury in 1905 AC 480. There is no reason why the principle stated in the said decision should not be extended to a party and the absolute privilege confined only to the statement of a witness under such circumstances, Of the two instances referred to by Blagden J. in ILR [1943] 1 Cal 250 the first refers to the editor of a newspaper as stated above. But it is doubtful whether the editor of the newspaper in such circumstances can claim absolute privilege on the basis of the principle laid down in 1905 AC 480. With regard to the second illustration referred to by Blagden J, if the complaint to the police results in an unsuccessful prosecution then the person defamed can only claim damages for malicious prosecution and not for defamation. In case the complaint to the police does not result in a prosecution, then also the persons defamed have no remedy in respect of defamatory statements made in such a complaint to the police. But if a false complaint is made to the police, the person who makes such a false complaint would be punishable either under s. 182 or s. 182 or s. 211 of the Indian Penal Code. It cannot therefore be said that a person against whom false charges are made in a complaint to the police, even if no further action is taken by the police authorities on such complaint, goes scot-free. I would,

therefore prefer to follow the earlier view if the division bench of the same High Court in AIR 1939 Cal 477 and the other decisions referred to above which take the view that a complaint to a police officer is absolutely privileged.

8. It must therefore be held that the statements made by the defendant in his complaint to the police officer are absolutely privileged. This appeal is accordingly dismissed. Parties shall bear their own costs in this appeal.

[24] I now refer to *Madhab Chandra v. Nirod Chandra* AIR [1939] Calcutta 477 wherein SK Ghose J stated as follows:

With regard to the absolute judicial privilege which is applicable to statements made by witnesses, the relevant English law may be stated thus:

No action for libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognized by law proceeding, though the words were written or spoken maliciously without any justification or excuse, and from personal-ill-will and anger against the person defamed. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them.

...

With regard to the question whether statements to the police as distinct from statements in court are protected, I have already pointed out that the settled law in England is that statements made with a view to repeating them on oath in a subsequent judicial proceeding are similarly protected. In a sense, statements made to the police appear to be in this respect on stronger ground than statements made to the solicitor as reported in [1905] A C 4803 or [1914] 30 T L R 59111. For statements made to a solicitor may or may not be followed up by judicial proceeding, the matter being at the option of the party consulting such solicitor, in which case the statements would slumber in the office of the solicitor, as Lord Halsbury said. But the party lodging information before the police has no option and the police

A are empowered to go on with the matter and investigate, leading to other results. It has been held in the case of complaints to a magistrate whom the magistrate may have referred the matter for investigation that such statements are absolutely privileged and no action for defamation is maintainable. See case in 49 Mad 31512.

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[25] In *Messrs Bapalal & Co v. AR Krishnaswami Iyer* AIR [1941] Madras 26, King J held that a complaint to a police officer from its very nature as a statement which the complainant is prepared later if called upon to do so to substantiate upon oath is C absolutely privileged.

[26] Recently in England in *Buckley v. Dalziel & Anor* [2007] 1 WLR 2933, the court held "that the need to protect those who provided evidence to police officers, or other investigatory D agencies, in the course of an inquiry into possible illegality or wrongdoing had to take priority over any competing public policy consideration; that that was so whether the informant was a mere witness or the initial complainant; and that, accordingly, the contents of the first defendant's police-statement were protected E by absolute privilege and immunity from suit."

[27] Buckley applied *Taylor v. Director of the Serious Fraud Office* [1999] 2 AC 177 wherein the House of Lords relying "on the public policy argument extended the defence of absolute privilege F to those involved during the investigative process. Nevertheless such persons could be prosecuted under the Penal Code or face a civil suit for malicious prosecution. But my reading of the above cases is that absolute privilege will afford them a defence against a defamation suit.

G **[28]** In *Wescott v. Wescott* [2009] 2 WLR 838, the issue before the Court of Appeal was whether a person who makes a complaint to the police thereby instigating a police investigation which does not lead to a prosecution can shelter behind the defence of absolute privilege if a claim is brought against her for H defamation; or whether such a complaint should be protected by qualified privilege so that the defence will only be defeated if the claimant can establish malice.

[29] The Court of Appeal in addressing that issue held:

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(a) that the immunity from suit which applied to out of court statements which could fairly be said to be part of the process of investigating a crime or a possible crime with a

view to a prosecution was not confined to persons who were subsequently called a witnesses, but applied to all those who participated in a criminal investigation, whether they were informants, investigators or prosecutors;

(b) that the immunity was given from the earliest moment that the criminal justice system became involved, which was when a complaint was first made, and there was no distinction between a step taken to instigate an investigation and the investigation itself;

(c) that, therefore, a person who made a complaint to the police, thereby instigating a police investigation which did not lead to a prosecution, was immune from suit in respect of that complaint;

(d) that any interference with the right to respect for private life, guaranteed by art. 8 of the convention for the Protection of Human Rights and Fundamental Freedoms, constituted by such immunity was justified under art. 8(2) as being necessary for the administration of justice; and

(e) that, accordingly, the occasion of the making of both the oral complaint and the subsequent written complaint was absolutely privileged and so the defendant was immune from suit in respect of the making of both complaints (post, paras 34, 35, 36, 38-39, 40, 41)

[30] I now refer to the judgment of Abdul Malik Ishak J (as he was then) in *BHLB Trustee Bhd & Anor v. HSBC (Malaysia) Trustee Bhd & Ors* [2006] 5 CLJ 381 at p. 395 para. 19 where the learned judge had this to say:

> [19] Malice would defeat the defence of qualified privilege. Malice is totally and wholly irrelevant to absolute privilege. The defences of qualified privilege and absolute privilege exist not for the purpose of licensing the defamer to defame but rather they are "for the common convenience and welfare of society". (*Toogood v. Spyring* [1834] 1 Cr M & R 181 at 193, per Parke B.)

[31] James Foong J (as he then was) had in *Thiruchelvasegaram Manikavasegar v. Mahadevi Nadchatiram* [2000] 5 CLJ 435, occasion to address the issue of absolute privilege and this is what the learned judge had to say:

> Having determined this rule of absolute privilege, the next course is to examine the extent or the categories of situation it covers Devlin LJ in *Lincoln v. Daniels* [1962] 1 QB 238 limited the application of this principle to three. They are at pp. 257-258:

A This (the first) category covers all matters which are done *coram judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M' Ewan* [1905] AC 480 in which the House of Lord held that the privilege attaching to evidence which witness give coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White* [1914] 30 LTR 591 the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[32] In *Kinyo Coating (M) Sdn Bhd v. ICI Paints (Malaysia) Sdn Bhd & Anor* [2011] 6 CLJ 911, Vazeer Alam JC at p. 920 para. 21 elaborated on the common law concept of absolute privilege as follows:

F The common law concept of absolute privilege gives a somewhat wider protection as seen in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* [1892] 1 QB 431, and as established in the Malaysian Court of Appeal case of *Savant-Asia Sdn Bhd v. Sunway Pmi-Pile Construction Sdn Bhd* [2008] 1 CLJ 191. The application of the defence of absolute privilege to matters done G *corum judice* is well expounded by Devlin LI in *Lincoln v. Daniels* [1962] 1 QB 238 at 257:

> The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are H done *corum judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends I to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institute the proceedings. The third category is the most difficult of the three to define. It

> is based on the authority of *Watson v. M' Ewan*, in which the House of Lords held that the privilege attaching to evidence which a witness gave *corum judice* extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v.White*, the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[33] Having the *dicta* of Devlin LJ in mind, I am of the decided opinion that a first information report made to a police officer is somewhat analogous to a statement taken by a solicitor from a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[34] Reference was made by the plaintiff to s. 11 of the Act which reads as follows:

> 11(1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be **absolutely privileged**, and any fair and *bona fide* comment thereon shall be protected although such judgment sentence or finding be subsequently reversed, quested or varied, unless at the time of publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known such reversal, questing or variation.

[35] However the plaintiff quotes *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445; [2012] 3 MLJ 173, and submits in paras. 8.7, 8.8 and 8.9 of his written submission that "it is clear the available defence in the Defamation Act 1957 are namely justification (s. 8), fair comment (s. 9) and qualified privilege of newspaper (s. 13), privileges at election (s. 14) and in amplification thereof, the two schedules annexed to the said Act". He concludes "that the common law defence of absolute privilege is not included in the available defences pursuant to the Defamation Act 1957, even though absolute privilege is provided in various status eg, Houses of Parliament Privileges and Powers Act 1952 (Act 347) and being statutory enactment they have the force of law. A first information report made to the police prior to the commencement of police investigation has no statutory force which make it absolutely privileged".

[36] *Dr Koay Cheng Boon*'s case (supra) *vis-à-vis* s. 11(1) can be explained in the context of our case as follows: s. 11(1) of the Act is not an exhaustive statement of the extent of the defence of absolute privilege in Malaysia; it is merely a description of the applicability of the defence of absolute privilege in the context of the report of court proceedings. Nothing more nothing less.

[37] In the context of a first information report, is my decision that the defence of absolute privilege is nevertheless available in regard to a first information report. This is so even though it is not specifically stated so under the Act. I say this because the doctrine of absolute privilege is primarily a public interest, public policy common law defence which has evolved over the years to extend absolute privilege to first information reports.

Conclusion

[38] Based upon the above reasoning it is therefore my conclusion that not only is the first information report protected by absolute privilege under common law, but it is so protected even though it may be defamatory in nature. My reason for such a conclusion is because public policy and interest demands that a person be free to lodge a first information report without the threat of being sued for defamation. While he is protected by absolute privilege he is not immune to a charge of lodging a false police report or a civil suit for malicious prosecution.

[39] I am fortified in my view by the *dicta* of Gopal Sri Ram J in *Abdul Manaf Ahmad v. Mohd Kamil Datuk Hj Mohd Kassim* [2009] 2 CLJ 121. At para. 4 of his judgment, the learned judge had this to say:

> [4] It is implicit from *Martin Rheinus v. Sher Singh* [1949] 1 LNS 49 that both statements made in first information reports under s. 107 of the Criminal Procedure Code and in police statements made under s. 112 thereof are absolutely privileged for the purpose of the law of defamation. I consider this to be good law. And I find support for the view I take of the matter from the decision of several Indian cases including *Bapal & Co v. V. Krishnaswami Iyer* AIR [1941] Mad 26. That was a case in which a letter of complaint to the police by the defendant alleging that the plaintiff had committed a crime was held to be absolutely privileged and therefore not actionable. By reason of what I have said thus far, I am unable to agree with the view

expressed in *Hoe Thean Sun & anor v. Lim Tee Keng* [1999] 1 CLJ 187, that a defamatory statement in a police report is only protected by the defence of qualified privilege. It is apparent from the report of that case that the decision in *Martin Rheinus v. Sher Singh* was not brought to the attention of the High Court. *There is no doubt that defamatory statements in police reports must attract the defence of absolute privilege for reasons of public policy. If actions can be brought against complainants who lodge police reports, then it would discourage the reporting of crimes to the police thereby placing the detection and punishment of crime at serious risk*. The criminal law readily provides for a remedy against persons who make false police reports.

[40] With the first information report being absolutely privileged, the plaintiff's claim is rendered on the face of it obviously unsustainable as it is devoid of a cause of action.

[41] I therefore find in favour of the defendant and rule that it is a plain and obvious case for striking out. I allow the defendant's application encl. 9 and strike out the plaintiff's writ with costs which I fix at RM5,000.

[42] So ordered accordingly.